No. 11140

In the United States Circuit Court of Appeals

For the Ninth Circuit

BERNARD G. SHEPHERD, *Appellant,*

vs.

MILDRED McDONALD, now
MILDRED MUCK, *Appellee.*

Appellee's Brief

Upon Appeal from the District Court of the United States
for the District of Oregon

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SUPPLEMENTAL STATEMENT OF CASE

The facts in the present cause, as set out in the statement of the case appearing in the Appellant's brief (page 2) are substantially correct. However, this statement fails to clearly point out the material and uncontroverted finding of the referee (Tr. 21, 28) that the debt of the objecting creditor, Mildred Muck (appellee) is the same obligation from which the bankrupt secured a discharge in his previous bankruptcy proceeding.

THE QUESTION ON APPEAL

Does the Waiver of a Discharge Become a Bar to a Further Discharge of the Same Debts in a Subsequent Proceeding of the Same Bankrupt?

POINTS AND AUTHORITIES

I.

The bankruptcy court may upon motion of proper party or on its own motion, qualify the discharge of the bankrupt to exempt certain debts not dischargeable in the proceeding.

Volume 1, Collier on Bankruptcy, 14th Edition, 1381, 1382, Paragraphs 14.62, 14.63.

Volume 7, Remington on Bankruptcy, 696, Section 3441.

Section 17, Bankruptcy Act, (U.S.C.A., Title II, Chapter 3, Sec. 35)

Freshman v. Atkins, 269 U.S. 121; 70 L. ed. 193; 46 S. Ct. 41.

Blumenthal v. Jones, 208 U.S. 64; 52 L. ed. 390.

In Re Finkelstein, CCH Bankruptcy Law Service, Par. 55479.

Matter of Summer, 107 F. (2d) 396; 41 A.B.R. (N.S.) 246.

In Re Tucker, 49 F. Supp. 239; 53 A.B.R. (N.S.) 106.

In Re Zitzman, 46 F. Supp. 314; 50 A.B.R. (N.S.) 724.

Matter of Early, 34 F. Supp. 774; 43 A.B.R. (N.S.) 518.

Hisey v. Lewis-Gale Hospital, 27 F. Supp. 20; 40 A.B.R. (N.S.) 206.

II.

The waiver of a discharge secured in a bankruptcy proceeding is a bar to a discharge of the same debt in a subsequent proceeding by the same bankrupt.

Volume 7, Remington on Bankruptcy, 419, Sections 3184, 3185.

Volume 7, Remington on Bankruptcy, 715, Section 3457.50.

Volume 7, Remington on Bankruptcy, 849, Section 3586.

Volume 7, Remington on Bankruptcy, 1944 Supp. 40, 41, 42.

Volume 1, Collier on Bankruptcy, 14th Edition, 1657, Par. 17.27.

67 Corpus Juris, 289, Section 1.

Article 1, Section 8, Constitution of the United States.

Section 14c (5) Bankruptcy Act, (U.S.C.A. Title 11, Chapter 3, Sec. 32)

Freshman v. Atkins, 269 U.S. 121, 46 S. Ct. 41, 70 L. ed. 193.

Matter of Summer, 107 F. (2d) 396; 41 A.B.R. (N.S.) 246.

Perlman v. 322 West 72nd Street Co., 127 F. (2d) 716; 49 A.B.R. (N.S.) 212.

Shopnick v. Tokatyan, 128 F. (2d) 521.

Colwell v. Epstein, 142 F. (2d) 138; 56 A.B.R. (N.S.) 97; 156 A.L.R. 836.

In Re Brown, 35 F. Supp. 619; 47 A.B.R. (N.S.) 539.

Kuntz v. Young, 131 F. 719; 12 A.B.R. 505.

In Re Loughran, 218 F. 619; 33 A.B.R. 350.

Matter of Schwartz, 248 F. 841; 41 A.B.R. 246.

Armstrong v. Norris, 247 F. 253; 40 A.B.R. 735.

In Re Zeiler, 18 F. Supp. 539; 43 A.B.R. 627.

In Re Fiegenbaum, 121 F. 69; 9 A.B.R. 595.

In Re Vardell, 28 A.B.R. (N.S). 697.

In Re Bybee, 124 F. 1011.

Matter of Baker, 275 F. 511; 47 A.B.R. 255.

Matter of Dierck, 37 A.B.R. (N.S.) 198.

Prudential Loan and Finance Company v. Robarts, 52 F. (2d) 918.

III.

The debt of Mildred Muck, objecting creditor, (appellee), is the same obligation scheduled and discharged in bankrupt's first proceeding.

Volume 7, Remington on Bankruptcy, 420 Section 3184.

Volume 7, Remington on Bankruptcy, 703, Section 3448.

Volume 8, Remington on Bankruptcy, 32, Section 3718.

Volume 1, Collier on Bankruptcy, 14th Edition, 1385, Par. 14.67.

8 Corpus Juris Secundum, 1577, Section 583d.

General Order in Bankruptcy XLVII.

Colwell v. Epstein, 142 F. (2d) 138; 156 A.L.R. 836.

In Re Kuffler, 158 F. 1021; 22 A.B.R. 289.

Matter of Summer, 107 F. (2d) 396; 41 A.B.R. (N.S.) 246.

In Re Schnabel, 166 F. 383; 23 A.B.R. 22.

Matter of Cox, 33 F. Supp. 796; 47 A.B.R. (N.S.) 668.

Tubbs v. McCabe, 165 Atl. 336.

United States National Bank of LaGrande v. Miller, 118 Or. 280; 245 Pac. 726.

Holden v. Chamberlin, 46 N. D. 353; 179 N.W. 706.

Blumenthal v. Jones, 208 U.S. 64; 52 L. ed. 390.

ARGUMENT

I.

Appellant has contended with some earnestness, that the bankruptcy court has no power to determine the effect of a discharge or to pass upon the question as to whether a particular debt has been discharged. Such argument seems to be untenable in the light of many authorities, which hold that the bankrupty court has the power to qualify the discharge of the bankrupt upon its own motion, or upon motion of one of the parties to exempt therefrom debts not dischargeable in the proceedings. This rule has been summarized in *Volume 7, Remington on Bankruptcy,* 696, Section 3441, where it is stated: (italics ours)

"Nevertheless, where it is not the effect of a discharge on a particular debt that is involved, but rather the right itself to a discharge, and where such right exists as to some creditors and not as to others, as in cases of former denial of discharge, *the court undoubtedly may give effect to the res judicata by excepting debts provable under the former bankruptcy.*"

Many authorities are cited in this text to support the statement, and particular reference is made to *Freshman v. Atkins,* 269 U.S. 121, 123, 46 S. Ct. 41, 70 L. Ed. 193, 6 A.B.R. (N.S.) 744; *Hisey v. Lewis-Gale Hospital,* 27 F. Supp. 20; 40 Am. B.R. (N.S.) 206.

See also *Volume 1, Collier on Bankruptcy,* 14th Ed. 1381, 1382, paragraphs 14.62, 14.63.

In Re Finkelstein (U. S. D. C. E. D. N. Y., Oct. 15, 1945,) (C. C. H. Bankruptcy Law Service 55479), it has recently been held that a creditor whose debt had been previously listed in a proceeding from which the bankrupt did not secure a discharge was entitled to secure a qualification of an order of a discharge in a second proceeding commenced by the bankrupt more than ten years after the discharge in the second proceeding was granted.

The foregoing rule is further supported by the many authorities that hold that if a creditor having a non-dischargeable debt, does not secure an exemption from

the discharge, he will be bound by the discharge. A statement to this effect is found in *Volume 7, Remington on Bankruptcy,* 697, Section 3441: (Insertion ours)

> "Otherwise, (referring to exemption of dischargeable debt from discharge), such debts, being likewise provable under the present bankruptcy, would be discharged by the present discharge, and the former adjudication be defeated." (Citing Blumenthal v. Jones, 208 U.S. 64; 52 L. Ed. 390.)

If the bankruptcy court grants a discharge, and the debt is a provable and dischargeable debt, it is elementary that a state court is bound by the discharge. On the other hand, if the debt is one that is expressly excepted from discharge under Section 17 of the Bankruptcy Act*, the effect of the discharge upon the debt may be determined by a state court. However, the situation is far different where the debt is not dischargeable because of a substantive rule of law. Such a rule has been well established from the authorities cited in this brief under Point II, where it appears that a bankrupt, who has not secured a discharge either through his failure to apply or a denial thereof, is not entitled to secure a discharge from any of the debts scheduled in such proceeding in a subsequent proceeding of the same bankrupt.

This rule has become established notwithstanding the

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* See Appendix.

nondischargeability of certain debts under Section 17 of the Bankruptcy Act*, and accordingly creates an exemption from the operation of a discharge without legislative enactment but based solely upon judicial determination. The authorities cited heretofore clearly disclose that a creditor entitled to such an exemption must, in order to preserve the exemption, secure a qualified order of discharge in the subsequent proceeding of the bankrupt. See *Blumenthal v. Jones, supra.*

It follows therefore that the referee and the district court in the instant matter were clearly within their power in entering a qualified order of discharge, exempting the debt of the objecting creditor, Mildred Muck, (appellee).

ARGUMENT

II.

The referee and the district court have found that the debt of the objecting creditor herein, was discharged in the bankrupt's prior proceeding, but that the bankrupt expressly waived the discharge and agreed to pay the debt irrespective of the discharge, and that as a consequence the debt is exempt from the discharge in the second proceeding.

As has been stated by the referee in his opinion, and by the appellant, this is a matter of original impression.

* See Appendix.

No direct authority has been found to sustain or controvert the determination made herein.

It has become well established that the denial of a discharge or the failure to apply therefor in an earlier proceeding where formal application was necessary, is a bar to a discharge of all debts provable in such proceeding in any subsequent proceeding of the same bankrupt. *Volume 7, Remington on Bankruptcy,* 419, Section 3184, 3185. See 1944 Supp. 40, 41, 42; *Volume 1, Collier on Bankruptcy,* 14th Edition, 1657, par. 17.27.

The leading case is *Freshman v. Atkins,* 269 U.S. 121; 46 Sup. Ct. 41; 70 L. ed. 193; 6 A.B.R. (N.S.) 744. Other cases in which this rule has been thoroughly discussed are: *In Re Summer,* (C.C.A. 2d, 1939) 107 F. (2d) 396; 41 A.B.R. (N.S.) 246; *Perlman v. 322 West 72nd Street Company,* (C.C.A. N. Y. 1942) 127 F. (2d) 716; 49 A.B.R. (N.S.) 212; *Shopnick v. Tokatyan,* (C. C.A. 2d, 1942) 128 Fed. (2d) 521; *Colwell v. Epstein,* 142 Fed (2d) 138; 56 A.B.R. (N.S.) 97; 156 A.L.R. 836. *In Re Brown,* 35 F. Supp. 619; 47 A.B.A. (N.S.) 539; *Kuntz v. Young,* 131 F. 719, 12 A.B.R. 505; *In Re Kuffler,* 151 Fed. 12, 12 A.B.R. 16; *In Re Loughran,* 218 Fed. 619; 33 A.B.R. 350.

The foregoing rule has been further extended to provide that an application for discharge made in due time,

but voluntarily withdrawn or abandoned is in legal effect the same as a failure to apply and accordingly a bar to a discharge in a second proceeding of debts provable in the former proceeding. *Volume 7 Remington on Bankruptcy,* 420, Section 3184, Note 17. *Volume 1, Collier on Bankruptcy,* 14th Edition, 1657, par. 17.27. *Freshman v. Atkins,* supra; *Matter of Schwartz* (D. C., Ohio), 248 Fed. 841; 41 A.B.R. 246; *Armstrong v. Norris.* (C.C.A. 8th) 247 Fed. 253; 40 A.B.R. 735; *In Re Zeiler,* (D. C. N. Y.) 18 Fed. Supp. 539; 43 A.B.R. 627.

All pertinent cases on both of the foregoing well established rules, have been collected in an annotation appearing in 156 A.L.R. 839, following the case of *Colwell v. Epstein.* These rules have not been altered by the 1938 amendments to the Bankruptcy Act, wherein it is provided that the application for discharge is automatic upon the bankrupt's adjudication. *Perlman vs. 322 West 72nd Street Co. Inc.,* 127 F. (2d) 716; 49 A.B.R. (N.S.) 212. *In Re Brown,* 35 F. Supp. 619; 47 A.B.R. (N.S.) 539.

In the present instance, the bankrupt secured a discharge of the debt of the objecting creditor in the first proceeding. He voluntarily and expressly waived the discharge, which is in effect no different than voluntarily withdrawing an application made in his prior proceeding, and accordingly is entitled to the same legal effect. The

failure to apply for a discharge when the bankrupt is entitled to it, or the voluntary withdrawal of the application, constitutes a waiver of that right within the definition of waiver that is cited by appellant in his brief at page 37. "Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a non-existing legal right, advantage, benefit, claim or privilege which, except for such waiver, the party would have enjoyed." *67 Corpus Juris,* 289, Sec. 1.

The authorities that have been cited herein and which have established the rule that a denial or abandonment of a discharge in an earlier proceeding is a bar to a discharge in a second proceeding of debts provable in the former proceeding so hold, because:

(1) To grant a discharge in the second proceeding from debts provable in the earlier proceeding would enable the bankrupt to evade the statutory limitation and place within his control the time when he should act. This would interfere with the speedy administration of the bankrupt's estate and would be contrary to the spirit and purpose of the statute.

(2) The failure to secure a discharge is in effect a judgment by default where no application has been made, or if application has been made, then it has the effect and force of an ordinary judgment. Such a judgment,

it has been held, is conclusively res adjudicata between the bankrupt and the creditors whose debts were provable in the prior proceeding. The issues in a subsequent proceeding of the bankrupt in which he applies for a discharge with any or all of the same debts scheduled are identical.

Some of the authorities cited in support of the foregoing rule, point out that the only object of a bankruptcy proceeding in a no asset case is to secure a discharge, and if the bankrupt fails to prosecute an application successfully, or voluntarily waives his right to a discharge, he should be barred from securing a discharge in another proceeding of the debts that were provable in the first proceeding. Such a case, it has been held, is *tantamount to an abuse of process of the court. In Re Fiegenbaum,* 121 Fed. 69, 9 A.B.R. 595. *Freshman v. Atkins,* 269 U.S. 121, 123, 46 S. Ct. 41, 70 L. Ed. 193; 6 A.B.R. (N.S.) 744. *In Re Vardell,* 28 A.B.R. (N.S.) 697. *Perlman v. 322 West 72nd Street Co., Inc.,* 127 F. (2d) 716; 49 A.B.R. (N.S.) 212.

We fail to see the pertinence of *In Re Bybee,* 124 F. 1011 (D.C.N.D. Cal. 1903), cited by appellant in his brief at page 27, which holds that a denial of a discharge upon a particular debt in a state court insolvency proceeding is not res adjudicata, and binding upon the bank-

ruptcy court where scheduled in a subsequent proceeding by the bankrupt. This authority is contrary to the legion of authorities we have cited herein, establishing the general rule that a denial of a discharge in a bankruptcy proceeding is a bar to securing a discharge in a subsequent proceeding by the same bankrupt from provable debts scheduled in the prior bankruptcy proceeding. To permit the state court insolvency proceeding as in the cited case to effect a bankruptcy discharge would be contrary to the spirit and intent of *Article I, Section 8 of the Constitution of the United States**, granting to Congress exclusive power to establish uniform laws on the subject of bankruptcy throughout the United States.

The Matter of Charles S. Baker, 275 Fed. 511, 47 A.B.R. 255 (D. C. S. D. N. Y. 1921), cited and quoted by appellant in his brief at page 28, is not applicable to the facts at hand. This authority has been cited to sustain the contention that a discharge, or the failure to secure a discharge, is not res adjudicata of the rights of the creditors of the bankrupt. Quoting from this case, as found in appellant's brief, (28) (Italics ours)

> "Failure to schedule and consequent failure to discharge a particular debt does not operate to adjudicate that the debt is not dischargeable. There is no res adjudicata doctrine, because nothing had been adjudicated so far as affects an unscheduled debt. If a

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* See Appendix.

discharge is refused then, of course, that refusal is res adjudicata, but, such is not this case. Cases cited by the attorney for the creditor are those where either (1) a discharge was previously refused or (2) where a previous petition in bankruptcy is still pending. Of course, where there is a refusal to discharge, the adjudication necessarily is that for the same reason justified by the statute the bankrupt cannot obtain a discharge of any of his debts.

"Where there is a previous proceeding pending, obviously the court will not entertain a second proceeding, so far, in any event, as affects debts existent at the time of filing the petition in the first proceeding. The case at bar, however, is different. Here the bankrupt did no act to bar his previous discharge and the effect of failure to schedule was merely to let the debt remain alive. When, therefore the bankrupt after six years seeks a discharge upon a new petition, the act contemplates that he may be discharged of any then existing debts."

In the foregoing case the debt was not scheduled in the first proceeding, and was thereafter scheduled in a second proceeding by the bankrupt. There can be no question that the failure to secure a discharge from a debt not scheduled (if the creditor had no notice of the bankruptcy) is not res adjudicata, and that such an unscheduled debt may be discharged in a subsequent proceeding. See *Volume 7, Remington on Bankruptcy,* 715 Section 3457.50, and page 849, Section 3586.

However, in the instant case, there is no problem of an unscheduled debt in the prior proceeding. The con-

tention is advanced by appellee that the discharge of the debt having been expressly waived, it is no different than a failure to apply for a discharge or a voluntary withdrawal and abandonment of an application for a discharge which is a bar according to the authorities cited herein to a discharge in a subsequent proceeding of all provable debts in the prior proceeding. This rule has been cited with approval in the foregoing opinion.

For the reasons above stated, the case of *Matter of Dierck,* 37 A.B.R. (N.S.) 198, (U.S.D.C. S.D.N.Y., Apr. 138), cited by appellant in his brief at page 30, is likewise inapplicable.

The facts of *Prudential Loan and Finance Company v. Roberts,* 52 Fed. (2d) 918 (C.C.A. 5th Cir. Oct. 1931), appearing in appellant's brief at page 31, are substantially different than the present matter. In the cited case the bankrupt was discharged in the first proceeding. Subsequently he contracted a new note obligation in favor of the same creditor. He filed a second petition in which he was unable to secure a discharge because it was filed less than six years since the discharge in the first proceeding was granted. (Section 14c (5) Bankruptcy Act,* U. S. C. A. Title XI, Chapter 3, Sec. 32.) The bankrupt filed a third petition from which he secured a discharge of the note

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* See Appendix.

obligation, which as has been stated, was executed subsequent to the first discharge, but which was scheduled in the second proceeding in which the bankrupt was unable to secure a discharge. The creditor contended that the debt having been scheduled in the second proceeding, from which no discharge could be obtained because of the express provisions of the Bankruptcy Act, that the debt was not dischargeable in the third proceeding.

The foregoing authority is an exception that the 5th Circuit has adopted to the rule that a denial or failure to apply for a discharge in a prior proceeding is a bar to a discharge of debts provable therein in a subsequent proceeding by the same bankrupt. This case has not been followed in other circuits and as a matter of fact has been expressly overruled by the recent case of *Shopnick v. Tokatyan* (C.C.A. 2d 1942), 128 F. (2d) 521, where the court held as follows:

> "Even without that provision we believe that the principle of res adjudicata should lead to the same conclusion. Denial of a discharge from provable debts or failure to apply for it within the statutory period, bars an application in a subsequent proceeding for discharge from the same debts. Freshman v. Atkins, 269 U.S. 121, 46 S. Ct. 41, 70 L. ed. 193; Perlman vs. 322 West 72nd Street Co., 127 F. (2d) 716; 49 A.B.R. (N.S.) 212; In Re Summer, 107 F. (2d) 396; 41 A.B.R. (N.S.) 246; In Re Schwartz, (CCA 2nd) 89 F (2d) 192.
>
> "We think this equally true whether the denial of the discharge was because of a previous discharge

within six years as in the case at bar, or on some other ground specified in section 14. In re McCausland (D C S D Cal) 9 F. Supp. 129; appeal dismissed (9 Cir) 79 F. (2d) 1001; Prudential Loan & Finance Co. v. Robarts (5 Cir) 52 F. (2d) 918; is to the contrary and Prof. Moore thinks it preferable to the McCausland decision. 1 Collier on Bankruptcy 14th Ed. page 1372, c/f 45, Harvard Law Review 1910. We respectfully disagree and believe that the appellant's (creditor) claim was not dischargeable in the third bankruptcy; consequently it was wrong to stay prosecution of it in the state court. In Re McCausland, supra."

In *Shopnick v. Tokatyan,* supra, the Circuit Court of Appeals for the 2nd Circuit, relied upon the opinion *In Re McCausland,* (D. C. S. D. Cal) 9 F. Supp. 129, (appeal dismissed 9th Cir. 79 F. (2d) 1001), a decision in this circuit and which should be the better rule than that adopted in the case of *Prudential Loan & Finance Company v. Robarts,* supra. In the latter case, even conceding the exception to the general rule as determined therein, it is submitted that it is not applicable in the instant matter. Such an exception is based wholly on the contention that in an application for a discharge, commenced by a bankrupt within six years after securing a discharge in a former proceeding, the second proceeding is a futility. This is not the situation in the present matter.

Appellant is apparently not clear in his recognition

of the basis of the referee's order in the present matter. At page 34 of his brief, he contends that if the referee has determined that the debt of the objecting creditor is not dischargeable in the present proceeding because of the doctrine of res adjudicata, that the fact that in the first bankruptcy proceeding the debt in question was discharged, establishes that it should be discharged in the present proceeding. This is not the correct interpretation of the referee's opinion and order.

Simply stated, the referee has found that the debt of the objecting creditor being scheduled in the first proceeding and discharged therein, that it possesses all the inherent incidents so far as that proceeding is concerned. Furthermore, that inasmuch as the bankrupt has waived the discharge of the debt, such a waiver is the same as a voluntary withdrawal or abandonment of the bankrupt's application for a discharge in the first proceeding, and in accordance with the well established rule, the fact that the debt was scheduled in the first proceeding and a discharge expressly waived, a bar exists against the same debt being discharged in a subsequent proceeding.

In other words, so far as this particular creditor and the bankrupt is concerned, the dischargeability of the debt having once been before the bankruptcy court for

determination, it is res adjudicata. It is condeded that the holding may be different if the debt scheduled in the second or subsequent proceeding is a new debt, but this is not the situation in the existing matter.

The debt as it now exists in the form of a judgment was secured in the Circuit Court of the State of Oregon in a proceeding in which the bankrupt asserted the defense of the first discharge and the creditor made a plea of express waiver of the discharge. All of these matters in controversy in that action are now res adjudicata.

The waiver of the discharge in the first bankruptcy proceeding being one of the issues in the action in the state court and having been adjudicated in favor of the objecting creditor, it must be concluded that the judgment in that action was upon the original debt, and not upon a new debt. The referee in his opinion has so found (Tr. 21, 28). A more extensive discussion of whether the debt in the present matter is the same obligation as was scheduled in the first proceeding of the bankrupt is the subject of the argument under Point III of this brief.

It follows that the bankrupt having expressly waived the discharge as it affected the debt of the objecting creditor cannot secure a discharge of the same obligation in any subsequent proceeding.

ARGUMENT

III.

The finding of the referee as appears in his opinion, which has been adopted by the district court, and is based upon evidence submitted at a hearing and clearly establishes that: "The objecting creditor's claim is based upon a judgment obtained in an action for the recovery of money owing on certain notes scheduled in the previous bankruptcy, (Tr. 21) * * * "That the debt owing the objecting creditor is the same obligation from which the bankrupt received a discharge in his first bankruptcy." (Tr. 28).

It has been held that the referee's findings of fact are to be accepted by the judge unless clearly erroneous. *Volume 1, Collier on Bankruptcy,* 1385, par. 14.67. This has been similarly stated in *Volume 8, Remington on Bankruptcy,* 32, et seq., Section 3718. The foregoing texts discuss the effect of the following General Order XLVII promulgated by the United States Supreme Court and applicable to bankruptcy proceedings:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

It is difficult to see how the finding of the referee, as referred to herein, can be considered erroneous. As we have heretofore pointed out, in the action commenced in the Circuit Court of the State of Oregon, a determination was made that the discharge of the original debt was waived, and accordingly the action therein commenced was upon the old obligation and not a new one. The referee in his finding has given proper effect to the determination of the state court action.

Many authorities can be found to give legal effect to the rule that a discharged debt subsequently revived by a new promise does not lose its original incidents, and is considered the old debt, and not a new one, except as in some instances when the express intention of the parties appears to clearly create a new debt by the new promise. To this effect, reference is made to *8 Corpus Juris Secundum,* 1577, Section 583d (cited by appellant in his brief at page 41)

> "The authorities are not in accord on the question of whether the new promise or the old debt forms the basis for recovery against the bankrupt. There are on the one hand those cases which hold that, since the new promise serves merely to revive the original debt, the creditor is required to declare on the original obligation rather than on the new promise, the terms of the old obligation or engagement being the test or measure of the recovery. Other cases, however, take the view that the discharge in bankruptcy extinguishes the original obligation. The new promise

creating a new cause of action which forms the basis of the recovery.

"Apparently recognizing the conflict aforesaid but regarding it as merely one of form, there are cases which hold that the creditor may proceed either on the original debt or on the new promise, and if the old debt be declared on, the new promise may be set up by way of reply."

The rule enunciated in the foregoing text and adopted by many courts is based on the well established rule summarized in *Volume 7, Remington on Bankruptcy,* 703, Section 3448, as follows: (parenthesis ours)

"Discharge is neither a payment nor an extinguishment of debts; it is simply a bar to their enforcement by legal proceedings." (Numerous cases are cited in this text in support of this principle, and perhaps the leading case is Zavelo v. Reeves, 227 U.S. 625; 57 L. ed. 676; 33 Sup. Ct. 365; 29 A.B.R. 493.)

For a complete discussion of this subject with reference to the particular debt in the present matter, we refer this court to the exhaustive opinion of the learned referee, and more particularly that portion commencing on page 20, Transcript of Record, and continuing through page 27. It is difficult to elaborate upon the reasons and authorities found in the referee's opinion.

In appellant's brief, at page 40, he has urged, in a discussion of the case of *United States National Bank of*

LaGrande vs. Miller, 118 Or. 280; 245 Pac. 726, that the rule adopted by the Supreme Court of the State of Oregon is to the effect that a debt discharged in bankruptcy and revived by a new promise is a new debt. The portion of the opinion of the foregoing case quoted by appellant refers only to the rule then in existence to the effect that the moral consideration of the discharged debt is sufficient to support a new promise. As has been pointed out by the referee in his opinion (Tr. 25) cited above, such a rule is not entirely in accord with the more recent trend that the rights of a discharged creditor under such circumstances are not based on a moral consideration.

Furthermore, in the case of *United States National Bank vs. Miller,* supra, the court did not limit its holding to the matter quoted in appellant's brief and cited herein, but it held that whether the debt was a new or old one, even after the execution of new notes, *was only a matter of form.* We quote from this case at page 295 of the Oregon Reports: (italics ours)

> "We notice there is some respectable authority for the proposition that a debt barred in bankruptcy is not revived by a new promise to pay the same as suggested by the answer; and that an action to enforce payment thereof must be based upon the new promise. *As we have noted in regard to defendant's answer, this is only a matter of form.* See note J, 135 Am. St. Rep. 387. It is stated in 7 C.J. 413, Section 732, as follows:

" 'An action to recover the debt may be based either on the original debt or on the new promise. The pleadings in such an action are subject to the usual rules of construction.'

"The written contract was offered in evidence, among other things, as a defense to plaintiff's second and third causes of action, which are based upon the new post bankruptcy notes executed during the two years plaintiff was financing defendant in his farming operations. All of the seven notes and renewals thereof given plaintiff by defendant during 1921 and 1922 were fully explained by the cashier of the bank during the trial and counsel for defendant stated at the time that defendant accepted the statement of the bank in regard thereto. So. further comment in regard to such new notes is unnecessary."

Appellant in his brief at page 41 has cited authorities which he claims is the majority rule for the proposition that a judgment based upon a new promise is an entirely new indebtedness. With the contention that that is the majority rule, appellee must disagree. Ample authority may be found to the contrary. *In Volume 7, Remington on Bankruptcy,* 420, Section 3184, Note 16, it is stated:

"And the putting of a debt provable in bankruptcy into judgment, after the expiration of the time within which to apply for a discharge, creates no new debt, so as to entitle the bankrupt to institute a new bankruptcy proceedings."

A similar statement of the rule is found in the anno-

tation following the case of *Colwell v. Epstein,* reported in 156 A.L.R. 836, 838, where the editor in support thereof, cites the following authorities:

Re Kuffler (1909; CCA 2d), 158 F. 1021, 22 Am. Bankr Rep 289 (writ of certiorari denied in (1909) 214 US 520, 53 L ed 1066, 29 S Ct 701);

Re Summer (1939 CCA 2d) 107 F (2d) 396, 41 Am. Bankr Rep (NS) 246 (writ of certiorari denied in (1940) 309 US 680, 84 L ed 1024, 60 S Ct 718);

Re Schnabel (1909; DC) 166 F 383, 23 Am Bankr Rep. 22.

An analysis of *Holden v. Chamberlin,* 46 N.D. 353; 179 N.W. 706, cited in appellant's brief at page 42, discloses that the Supreme Court of North Dakota has held: "That an obligation discharged in bankruptcy is wholly extinguished." This is directly opposite and opposed to the opinion of the United States Supreme Court in the *Case of Zavello v. Reeves,* supra, and the many other cases supporting the proposition that a discharge is neither a payment nor extinguishment of debts, but is simply a bar to their enforcement by legal proceedings, as appears in Section 3448 of *Volume 7, Remington on Bankruptcy,* 703, heretofore cited.

Reference is made by the appellant on page 43 of his brief to support his contention that the debt in the present matter is a new one by quoting from the opinion

in the case of *Matter of Cox,* 33 F. Supp. 796; 47 A.B.R. (N.S.) 668. (U.S.D.C.W.D.K. July 9, 1940). In this case the bankrupt petitioned for an injunction restraining the creditor from further proceedings against him in an action in the Jefferson Circuit Court of Kentucky. This action was commenced by the creditor after the bankrupt's adjudication, but prior to his application for discharge, based upon a new promise that the bankrupt made to the creditor subsequent to the adjudication. The bankrupt permitted a default judgment to be entered against him (no specification in the judgment appearing as to whether the same was secured on a cause of action of the old debt as revived or upon a new debt). A reading of this opinion further discloses that the court construed that a new debt was created. Quoting from page 798, of the Federal Supplement Report:

> "If the action in the state court was upon a claim which was dischargeable in bankruptcy, the judgment which was obtained has no more validity than the original claim itself. The debt on which the judgment was rendered is the same old debt that it was before notwithstanding the change in its form from that of a simple contract debt or unliquidated claim by merger into a judgment of a court of record. Boyington v. Ball, 121 U.S. 457, 7 S.Ct. 981; 30 L. ed. 985.
>
> "This situation is materially different in legal effect from the case where a judgment is rendered after the discharge in bankruptcy has been granted and the defendant fails to plead his discharge. In such cases the judgment has been held to be valid. Dimock v. Revere Copper Company, 117 U.S. 559, 6 S. Ct.

855; 29 L. ed 994, Jackson v. Shaw, 20 Cal. App. 2d 740, 68 P. (2d) 310.

"In the present case it was impossible for debtor to plead his discharge in bankruptcy to the action instituted in the state court because no such discharge had been obtained at the time when the judgment was rendered.

"If the judgment in the state court is upon the new promise rather than upon the old indebtedness, a different situation exists, because the new promise is not a claim provable or dischargeable in bankruptcy. The claim based on the new promise comes into existence after adjudication;"

In the foregoing opinion there was no question of waiver of the discharge involved. The bankrupt did not even have an opportunity to interpose the defense of his discharge inasmuch as the action was commenced while the bankruptcy proceeding was pending. As has been stated, the judgment failed to disclose whether the action was commenced upon the old debt as revived, or upon a new debt. From the court's holding as quoted herein, it appears that it considered the debt an entirely new one. These facts are far different than in the instant matter where the referee, as well as the state court, have found that the debt now existing is the same obligation from which the bankrupt secured a discharge in the first proceeding.

Appellant has next cited and quoted in his brief the

case of *Blumenthal v. Jones,* 208 U.S. 64; 52 L. ed. 390 (appellant's brief 45.)

The holding of this opinion is not germane to the issue as to whether the debt involved herein is the same obligation from which the bankrupt secured a discharge in his first proceeding. In the foregoing case, the Supreme Court of the United States held that in a subsequent proceeding of the same bankrupt in which he scheduled the same debt, which had not been discharged in an earlier proceeding, it was necessary for the creditor to secure a qualified order of discharge in order to exempt his debt from the effect of the second discharge. In the cited case the creditor did not take this action, and the court having no knowledge of the prior denial of the discharge, it was held that the creditor had waived the effect of the denial of the discharge in the first proceeding, and was subject to the full force and effect of the discharge in the second proceeding.

These facts are obviously far different than the facts in the present matter. As has been contended in the argument under Point I of this brief, where the foregoing case was cited, it is authority for the proposition that a bankruptcy court may qualify an order of discharge to exempt therefrom any debts not dischargeable in the proceeding, and that if a creditor does not appear

in the proceeding and does not assert his right to such exemption, he will be bound by the discharge.

In the referee's opinion (Tr. 25), as well as the brief of the appellant (p. 40), the rule is stated that most of the cases which deal with the question as to whether a discharged debt as revived by a new promise is a new or old debt hold that a new promise operates as a waiver.

Particular reference is made in support of the foregoing proposition to *Tubbs v. McCabe* (Del.) 165 Atl. 336, 338, where it was held as follows: (italics ours).

> "The defendant * * * contends that the old debt furnishes the foundation or consideration for such promise and that the rights of the plaintiffs are necessarily based on such contract * * * True, the new promise may, as a general rule, even be conditional and such a promise, if made, is the measure of the plaintiff's right whether relied on to raise the bar of the statute of limitations, or in a case where a defendant has been adjudicated a bankrupt * * *; but where the statute of limitations is involved it is well settled in this state that the action should be on the old debt and not on the new promise to pay. * * * *This can only be on the ground that the defense of the statute is waived * * *; and the same general principles* naturally apply to promises to pay made by a *bankrupt*. Restatement of the Law of Contr., vol. 1, section 86; 7 Rem. on Bankr. section 3499. In fact, the old theory that the rights of the plaintiffs in such cases are based on a moral consideration has now been very generally exploded. 1 Willist. on Contr. section 148. It is true that for some reason a specific promise to pay is necessary to remove the bar of the

statute in bankruptcy cases while a promise to pay will be inferred from a mere acknowledgment of a subsisting demand where the statute of limitations is involved * * * but whatever the reason for this difference may be, it does not affect the rule above stated."

It should follow that if the new promise operates as a waiver, and the debt is not extinguished by the discharge, the waiver may be plead in avoidance of the defense of a discharge in an action commenced upon the original obligation. This was the situation in the matter at bar.

CONCLUSION

It must be concluded, that if, as contended by the objecting creditor (appellee), the discharge in the present proceeding cannot affect her debt, it is essential that she secure a qualified order of discharge exempting her debt from the discharge. The power of the bankruptcy court to enter a qualified order appears to be clear in the light of the authorities that have been cited herein.

The order of the referee and the district court herein qualifying the discharge of the bankrupt to exempt therefrom the debt of the objecting creditor, is amply sustained in fact and in law. The rule has been well

settled, that a denial of a discharge whether upon grounds asserted under the provision of Section 14c, of the Bankruptcy Act, or any other substantive rule of law, is a bar to a discharge of provable debts in the first proceeding in any subsequent proceeding of the same bankrupt. The basis of the rule is the elimination of any circumvention of the time limitation imposed by the statute on the bankrupt in securing his discharge, the doctrine of res adjudicata as well as the fact that to permit the further discharge would also be vexatious and an imposition upon the court and its decree. The waiver of the discharge falls within the above rule, inasmuch as it is no different than the actual waiver of the right to the discharge by failing to apply for same in due time, or voluntarily withdrawing or abandoning an application for it. To hold otherwise would permit the bankrupt to make an arrangement with a creditor who might successfully oppose his discharge to refrain from asserting his objections to the bankrupt's discharge. This would be detrimental to all the other creditors and the administration of the spirit and intent of the Bankruptcy Act.

As to the matter of whether the obligation of the objecting creditor is the same debt, as the one from which the bankrupt secured a discharge in the prior proceeding, there should be very little doubt. The finding of the referee, which is uncontroverted, and which has been

adopted by the district court is clear in this particular. In addition thereto, the judgment of the Circuit Court of the State of Oregon clearly discloses that the issues therein involved the old debt and the waiver of the discharge of the bankrupt as it affected it and not a new obligation. Thus, in two proceedings has this matter been fully determined. Furthermore, the law as cited herein, amply justifies the legal conclusion that there has been no new debt created by the waiver of the discharge of the bankrupt in the first proceeding.

It is respectfully submitted that the order of the district court based upon the order of the referee excluding the obligation of the objecting creditor herein from the discharge of the bankrupt is correct and proper and should be affirmed by this court.

Respectfully submitted,
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APPENDIX

Article I, Section 8, Constitution of the United States:

"Powers of congress. The congress shall have power * * *

"To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; * * *"

Section 14 (c) Bankruptcy Act (U.S.C.A., Title 11, Chapter 3, Section 32)

"The court shall grant the discharge unless satisfied that the bankrupt has: * * * (5) within six years prior to bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act * * *"

Section 17, Bankruptcy Act (U.S.C.A., Title 11, Chapter 3, Section 35).

"Debts Not Affected by a Discharge. a. A discharge in bankruptcy shall release a bankrupt from all of his probable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not

been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceeding in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment."